80-452

No. ——

THE THE

Supreme Court of the United States

OCTOBER TERM, 1980

HENRICO COUNTY SCHOOL BOARD,
Petitioner,

v.

SUSAN PAXMAN and LESLIE GOUGH,
Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals For the Fourth Circuit in *Paxman, et al.*, v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980), properly awarded appellate attorneys' fees under 42 U.S.C. §1988 to respondents when they were not substantially the prevailing party?

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*Susan Paxman and Leslie Gough apparently adopted the style "Henrico County School Board and Albemarle County School Board, et al." in their Petition for a Writ of Certiorari as a shorthand by which to refer to the defendants "connected with Albemarle and Henrico Counties," which defendants were not dismissed by the Court of Appeals in *Paxman, et al.* v. *Campbell, et al.*, 612 F.2d 848, 854. In this Cross-Petition For Writ Of Certiorari, petitioner, to avoid confusion, will adopt this shorthand to refer to all defendants connected with Henrico County. These defendants are: Dr. W. E. Campbell, Mrs. John Deusebio, Cecil Childress, Mrs. Betty McMullin, Cecil F. Jones, Oliver J. Sands, Jr. and Rev. Walter Whitt. For a full style of the case before the Court of Appeals, see Appendix, pp. 22a-28a filed with the original Petition for a Writ of Certiorari.

None of the Henrico defendants presently holds the position which he or she held in 1971 when the Complaint was filed. The School Board recognizes, however, that any judgment against any named individuals in their official capacities as School Board members would effectively be a judgment against the School Board as presently constituted.

OPINIONS BELOW

Paxman, et al. v. *Campbell, et al.*, 612 F.2d 848 (4th Cir. 1980).

Paxman, et al. v. *Wilkerson, et al.*, 390 F.Supp. 442 (E.D. Va. 1975).

The relevant orders and opinions are printed in the Appendix filed with the original Petition for a Writ of Certiorari and reference is made to that Appendix for purposes of satisfying Rule 21.1(k), Rules of the Supreme Court of the United States.

JURISDICTION

On January 2, 1980, the Court of Appeals entered its decision below and, as part of its holding, granted to Mrs. Paxman and Mrs. Gough, respondents here, an appellate attorneys' fee in an amount still to be determined. Paxman and Gough's Petition for Rehearing *en banc* to address issues other than the question of attorneys' fees was denied on March 27, 1980. On June 24, 1980 respondents' application for an extension of time in which to file a Petition for Certiorari was granted to and including August 20, 1980. Petitioner files this Cross-Petition For Writ of Certiorari pursuant to Rule 19.5 of the Rules of the Supreme Court of the United States. Petitioner received the original Petition For Writ Of Certiorari to which this Cross-Petition For Writ Of Certiorari corresponds on August 22, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION

42 U.S.C. § 1988:

Proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This litigation began in 1971 when two teachers brought a class action suit against the members of the Henrico and Albemarle County School Boards. Jurisdiction in the District Court was invoked under 28 U.S.C. § 1343(3) and

§ 2201. The plaintiffs alleged that they represented all pregnant teachers in Virginia and that the members of the two school boards represented all other school boards in Virginia having discriminatory maternity leave policies. The filing of this case closely followed the District Court's decision in *Cohen* v. *Chesterfield County School Board,* 326 F.Supp. 1159 (E.D.Va. 1971), *rev'd,* 474 F.2d 395 (4th Cir. 1973), *rev'd,* 414 U.S. 632 (1974), which concerned a somewhat similar school board policy but which had not been brought as a class action. The Henrico and Albemarle School Boards in this case voluntarily abandoned the challenged policies in 1972 and did not seek to reestablish them despite the later decision of the Court of Appeals sitting *en banc* in *Cohen* upholding such policies. Accordingly, the focus of this litigation for the past eight years has been on the nature of the relief demanded by the teachers—a judgment granting monetary damages regardless of whether it is called back pay or something else—and on the District Court's orders certifying the respective classes as encompassing "all public school female teachers in Virginia" and all individual "members of all public county and city" school boards having pregnancy policies which require a pregnant teacher to cease teaching at some time other than a time of her own choosing.[1]

On January 2, 1980, in an *en banc* decision, the Court of Appeals below reversed the District Court's decision in this case on each significant issue. The Court of Appeals reversed the orders of the District Court that certified both a plaintiff class and a defendant class.[2] The Court of Appeals then dismissed all defendants except those connected with

[1] The District Court had first certified the defendant class as being composed of "all school boards . . ." but *sua sponte* amended the class definition to include the "members" of all school boards. See Appendix 15a, 36a-38a; 390 F.Supp. at 449; 612 F.2d at 852.

[2] See Appendix 39a; 612 F.2d at 854.

Albemarle and Henrico County.[3] The Court next reversed the District Court's award of monetary relief against the School Board members in their individual capacity.[4] The Court held that monetary damages could not be awarded against the School Board members in their official capacities.[5] Inexplicably, however, four of seven Judges then agreed that the School Board members "must offer reinstatement to Mrs. Paxman and Mrs. Gough at the first available opportunity, upon their written requests. . . ." [6] The Court imposed this requirement even though neither teacher had sought reinstatement following the end of her pregnancy; there is no indication that either teacher now seeks reinstatement; and neither has ever been denied reinstatement. The Court of Appeals then awarded to Mrs. Paxman and Mrs. Gough appellate attorneys' fees in an amount as yet undetermined with six of the seven Judges basing their decision upon the theory that the teachers were entitled to attorneys' fees for "defending their reinstatement on appeal. . . ." [7]

REASONS FOR ALLOWANCE OF THE WRIT

The Court Of Appeals' Decision To Allow Attorneys' Fees Is Contrary To The Requirements Of § 42 U.S.C. § 1988 As Interpreted By Other Courts Of Appeals.

The District Court's order of March 5, 1975, granted summary judgment in favor of a class of pregnant teachers against a class purporting to include all members of certain school boards throughout the Commonwealth of Virginia. The effect of that judgment was to award monetary relief

[3] See Appendix 39a; 612 F.2d at 854.
[4] See Appendix 42a; 612 F.2d at 855.
[5] See Appendix 44a; 612 F.2d at 856.
[6] See Appendix 54a-55a; 612 F.2d at 861.
[7] See Appendix 55a; 612 F.2d at 861.

against a class of school board members in both their individual and official capacities.

On appeal the defendant school board members "substantially prevailed" [8] and the Court of Appeals reversed the District Court on each point which had any substance.[9] The certification of both the plaintiff and defendant classes was reversed. The award of monetary damages was reversed.

The only relief obtained by the teachers was the requirement that "the individual defendants . . . must offer reinstatement to Mrs. Paxman and Mrs. Gough at the first available opportunity, upon their written requests, which will not affect the continuity of instruction." [10] [Footnote omitted.] It was "for defending their reinstatement on appeal, for in that one aspect they prevailed",[11] that the Court awarded the teachers attorneys' fees.

As Chief Judge Haynesworth succinctly and without contradiction observed, however,

> There is in this case no showing of any failure to comply with any reemployment commitment. Neither teacher sought post-birth reemployment, and neither was wrongly denied it. Under these circumstances, *"reinstatement" to a position never sought seems entirely inappropriate.*[12] [Emphasis added.]

Thus, it is clear that the teachers have been granted an attorneys' fee as an award for obtaining relief which they never sought and which was never denied.

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[8] See Appendix 55a; 612 F.2d at 861.

[9] While the Court agreed that the policies violated the Due Process Clause of the Fourteenth Amendment, that point was moot because the School Boards had repealed the policies in 1972. See Appendix 34a; 612 F.2d at 852.

[10] See Appendix 54a-55a; 612 F.2d at 861.

[11] See Appendix 55a; 612 F.2d at 861.

[12] See Appendix 59a; 612 F.2d at 863.

Judges Widner, Russell, and Phillips would grant an attorneys' fee of $500, while Judges Butzner, Winter, and Hall believe that $500 is "grossly inadequate." Chief Judge Haynesworth believes $500 to be "inadequate." With these guidelines, the Court of Appeals directed the District Court to inquire into and ascertain appropriate appellate attorneys' fees[13] and also to resolve the question of attorneys' fees in the District Court.[14]

In *Huntley* v. *Community School Board of Brooklyn,* 579 F.2d 738 (2nd Cir. 1978), the Court affirmed a district court's refusal to award attorneys' fees under 42 U.S.C. §1988 to a plaintiff who at most had won a "moral victory." Of course, in order to be eligible for attorneys' fees a party must be a "prevailing party." In refusing an award of fees in *Huntley,* the Court properly ascribed meaning to the "prevailing party" requirement. In *Nadeau* v. *Helgemoe,* 581 F.2d 275, 278-279 (1st Cir. 1978), the Court held that in order to be considered a "prevailing party" one must succeed on a *significant* issue in litigation and that the award of fees should be based upon the amount of work performed on the issue in which the party was successful. Even prior decisions decided by panels of the Court of Appeals below accord the prevailing party requirement a significance which the Court subsequently ignored in its *Paxman* opinion. *Bly* v. *McLeod,* 605 F.2d 134 (4th Cir. 1979), *cert. denied,* —— U.S. —— (1980); *Bonnes* v. *Long,* 599 F.2d 1316 (4th Cir. 1979).

The Court of Appeals' award of appellate attorneys' fees in this case does not meet the §1988 prevailing party requirement because reinstatement was never an issue. As Judge Haynesworth found, reinstatement was neither sought nor denied. Because reinstatement was not an issue, it is

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[13] See Appendix 31a-32a; 612 F.2d at 851.

[14] See Appendix 55a; 612 F.2d at 861.

impossible to find that the teachers prevailed upon it within the meaning of §1988.

CONCLUSION

Because the judgment of the Court of Appeals, insofar as it awards appellate attorneys' fees and permits the award of attorneys' fees in the District Court, is contrary to 42 U.S.C. §1988, conflicts with decisions of other Courts of Appeals and, indeed, is totally unsupported by the facts, the Henrico County School Board, cross-petitioner, respectfully prays that this Court grant its Cross-Petition For A Writ Of Certiorari and reverse that portion of the judgment below awarding attorneys' fees to the teachers Susan Paxman and Leslie Gough.

Respectfully Submitted,

THE HENRICO COUNTY SCHOOL BOARD

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